EDITOR'S NOTE

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87-956

Supreme Court U.S.
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SEP 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1987

HARRY TOUSSAINT ALEXANDER,
Petitioner

v

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Harry Toussaint Alexander
1245 13th Street NW
Washington, DC 20005
Phone (202) 667-1616

QUESTION PRESENTED

Under the due process clause of the United States Constitution, Fifth Amendment, may a federal circuit court sanction an attorney by holding him personally liable for an appellee's fees and costs when the attorney, suspended from practice before the court by reciprocal enforcement of a state bar disciplinary action, neither participated in briefing nor in arguing an appeal prosecuted by a former associate?

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42 USC 2000e-5 ----------	1, 10

OPINION BELOW

The unpublished judgment, memorandum opinion, and pertinent orders of the United States Court of Appeals for the District of Columbia Circuit in No. 85-

OPINION BELOW

(continued)

5861, Grimes v. Safeway Trails, Inc., are set forth in the Appendix.

JURISDICTION

Jurisdiction is invoked under 28 US Code 1254(1) for review of the March 2, 1987, April 8, 1987, May 15, 1987, and June 30, 1987, judgments and Orders of the United States Court of Appeals for the District of Columbia Circuit holding petitioner jointly liable for appellee's attorney's fees and costs in Grimes v. Safeway Trails, Inc., No. 85-5861, D.C. Cir.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

Amendment 5, United States Constitution:

No person shall be ... deprived of ... property without due process of law.

28 USC 1912:

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

28 USC 1927:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED

(continued)

42 USC 2000e-5(k):

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Rule 38, Federal Rules of Appellate Procedure:

If a Court of Appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

SUPREME COURT OF THE UNITED STATES

October Term, 1987

HARRY TOUSSAINT ALEXANDER,
Petitioner

v

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATEMENT OF THE CASE

Two attorneys, petitioner and an attorney associate, represented Ronald B. Grimes against his former employer, Safeway Trails, Inc., in a 42 USC 2000e-5 action for alleged job discrimination, and retaliation, filed August 31, 1983, in the United States District Court for the District of Columbia. The associate took complete control of the case and responsibility for its prosecution, representing Mr. Grimes at all

proceedings, preparing and signing all pleadings, and handling all inquiries by opposing counsel.

Ineptly mishandled, the action first was dismissed without prejudice on May 16, 1984, then terminated on July 5, 1985 by a district court order denying a motion to reopen. On August 2, 1985, Mr. Grimes appealed this order to respondent, the United States Court of Appeals for the District of Columbia Circuit.

On December 13, 1985, respondent entered a reciprocal disciplinary order suspending petitioner indefinitely from practice as a member of its bar. The suspension has been continuous to this day. On January 16, 1986, petitioner's associate opposed a motion to dismiss Mr. Grimes' appeal and lodged an untimely brief under his own name as sole counsel for appellant urging reversal of the

district court order denying reopening of the action, contending the district court abused its discretion. Respondent accepted the brief for filing on March 4, 1986. Meanwhile, on February 7, 1986, Mr. Grimes' counsel on appeal terminated his association with petitionmer, already suspended by the Circuit Court of Appeals for the District of Columbia on December 13, 1985.

After briefing, including appellant's reply brief, appellee's supplemental brief, and oral argument, respondent on March 2, 1987 affirmed the order of the district court and awarded costs and attorney's fees to appellee, viewing Mr. Grimes' appeal as "clearly frivolous, unreasonable, and groundless," for challenging as an abuse of discretion, "a decision of the district court that is obviously entitled to respect."

On March 2, 1987, respondent ordered petitioner's former associate to show cause why it should not sanction him by holding him personally liable for appellee's fees and costs. The claims in appellant Grimes' brief, respondent held, were frivolous and without foundation, and, in addition, appellant's brief ascribed to an opinion of respondent's circuit language which neither appears in the cited decision nor in any other reported case.

Petitioner's former associate responded that he should not be personally liable for appellee's fees and costs because he was not responsible for the decision making authority in prosecuting the appeal and because the brief submitted under his name was prepared by a clerk delegated by petitioner.

Respondent then on April 8, 1987,

ordered petitioner to show cause why he should not be held personally liable for appellee's fees and costs. Petitioner was the attorney of record in the appeal, respondent alleged, until March 4, 1986, the date on which appellant's brief was filed.

Petitioner responded that he at no time directed his former associate to take any action for Mr. Grimes, nor directed appellate briefing tactics or decisions. He presented respondent with documents reflecting that his former associate had sole authority for prosecution of Mr. Grimes' appeal.

Thereafter on May 15, 1987, respondent ordered petitioner and his former associate jointly and severally liable for appellee's fees and costs, which appellee claimed as $34,065.26. Respondent allowed petitioner until May 29, 1987, to respond

to appellee's claim. Petitioner responded with a motion to reconsider the order of joint liability.

Petitioner's motion for reconsideration argued that, because he was suspended reciprocally from practice before respondent in late 1985, he could not have been counsel of record until March 1986 as alleged in respondent's show cause order. He further contended, under Roadway Express, Inc v Piper, 447 US 752, 100 SCt 2455 (1980), that respondent lacked authority to award attorneys' fees and costs against him, for his former associate clearly had sole responsibility for prosecution of the appeal. Petitioner also noted that the district court's order "obviously entitled to respect" in respondent's estimation failed to make findings, conclusions of law, or reasons for denying the motion to reopen,

as well as suppressing the live discrimination claim along with the dead retaliation claim.

Appellee Safeway Trails filed a timely opposition to petitioner's motion for reconsideration. Appellee conceded that petitioner could not have been counsel of record until March 1986 as respondent alleged. Appellee contended petitioner was wrong in asserting respondent's lack of authority against him to award fees and costs appellee had requested under Rule 38, Federal Rules of Appellate Procedure, 28 USC 1912, 1927, and Title VII of the Civil Rights Act. Appellee contended that an award against petitioner under Rule 38 and these statutes is proper according to respondent's previous decision in Reliance Insurance Co v Sweeney Corp, 253 USAppDC 183, 792 F2d 1137 (1986). Appellee further contended that petitioner's claim

that he should not be held responsible for what he asserts is solely his former associate's conduct is also meritless because he previously made those arguments, and respondent ruled against him. Safeway Trails failed to make any defense of the district court's order, on which petitioner had not been heard before his response to respondent's May 15, 1987 order of joint liability, but chose to stand on its brief on those points.

Without addressing any of petitioner's arguments, respondent on June 30, 1987, reduced its prior amount but ordered petitioner and his former associate jointly and severally liable to appellee for costs and attorney's fees in the amount of $21, 229.01. This petition followed.

ARGUMENT

Respondent's memorandum opinion holds that the district court's order did not constitute an abuse of discretion, and was obviously entitled to respect. Respondent therefore views Mr. Grimes' appeal as clearly frivolous, unreasonable, and groundless and grants appellee's request for costs and attorney's fees under the authority of Christianburg Garment Co v EEOC, 434 US 412, 98 SCt 694 (1978). Under its decision in Reliable Insurance Co v Sweeney Corp, supra, respondent holds petitioner liable as well as appellant, perhaps in the belief that appellee's former employee's financial resources are insufficient to satisfy appellee's request.

As petitioner argued to respondent, the Circuit Court lacks authority to award attorneys' fees and costs against him in the circumstances of Grimes v Safeway Trails, Inc.

I

Civil rights laws impose fees only against parties, not against their counsel

Neither 42 USC 1988 nor 42 USC 2000e-5(k) makes any mention of attorney liability for costs and fees, Roadway Express, supra at 761, 100 SCt at 2461. With no express indication of congressional intent, the fee provisions of civil rights laws authorize recovery from parties only and not from their attorneys, Id at 763, 100 SCt at 2462. As appellant Grimes brought his employment discrimination action under 42 USC 2000e-5, respondent has no authority to award fees and costs against petitioner on its

view of the appeal as clearly frivolous, unreasonable and groundless. The award is not proper under "Title VII of the Civil Rights Act," as Safeway Trails contended.

Appellee also contended that the award is proper under federal appellate procedure Rule 38 and 28 USC 1912, according to Reliable Insurance Co v Sweeney Corp, supra. Respondent's opinion in that case cites Rule 38 and Sec 1912 as authorities for an appellate court's "undisputed power to sanction a party who brings a frivolous appeal," Id at 184, 792 F2d at 1138 (emphasis supplied). According to respondent's opinion, appellee's request for fees and costs under Rule 38 and 42 USC 1912 was improper as against petitioner.

Appellee also cited 28 USC 1927 as authority for its request, perhaps in the belief that appellant's counsel could be

charged with "a reckless indifference to the merits," Reliable Insurance Co v Sweeney Corp, supra at 184, 792 F2d at 1138, in seeking appellate review. However, under the circumstances of the Grimes appeal, this statute also fails to authorize sanctions against petitioner.

II

As an attorney not "admitted to conduct cases" before respondent, petitioner cannot be sanctioned under 28 USC 1927.

On December 13, 1985, several weeks before petitioner's former associate lodged appellant's untimely brief, respondent acted upon a report of disciplinary action against petitioner in a state court by suspending him from practice indefinitely. The suspension was in effect continuously throughout the course of the Grimes appeal, and remains in effect today. Petitioner could not have been counsel of record until March 4,

1986, as respondent alleged, because he was not admitted to conduct cases before respondent after December 13, 1985.

As petitioner was not admitted to conduct any case before respondent, he could not have "multiplied proceedings" "to increase costs unreasonably and vexatiously" in terms of Sec 1927 while Grimes v Safeway Trails was before respondent. Only petitioner's former associate can be held accountable under that authority.

Without authority under statute or rule to impose sanctions on petitioner, respondent can rely only on its "inherent power," Roadway Express, supra at 756, 100 SCt at 2463, in narrowly defined circumstances to assess attorneys' fees against counsel. One such circumstance is the "bad-faith exception," Ibid, which respondent finds in this case. Here

again, however, petitioner cannot be found to have participated in the abuse respondent claims to uncover.

III

If Grimes was prosecuted in bad faith, petitioner was not responsible.

Respondent concludes that the brief filed by petitioner's former associate ascribed to an opinion of respondent's circuit language nonexistent in any reported case. Petitioner was not admitted to conduct cases before respondent when the brief was lodged on January 16, 1986. Petitioner's former associate terminated his association with petitioner on February 7, 1986, nearly a month before the lodged brief was accepted for filing, almost three months before filing of appellant's reply brief, many months before oral argument, and more than a year before respondent reached its decision.

In these circumstances, respondent cannot credit the representation of petitioner's former associate that he was not responsible for the decision making authority in prosecuting the appeal and did not prepare the brief filed under his name as counsel for the appellant. Any bad faith in the prosecution of the appeal is his alone. Petitioner should not be jointly liable to the appellee for fees and costs on that basis.

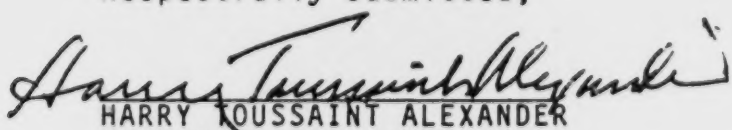
CONCLUSIONS

Because petitioner was not admitted to conduct cases before respondent during the course of the appeal that respondent views as frivolous and prosecuted in bad faith, respondent lacks authority to sanction him. Further, because during the pendency of the appeal petitioner had no authority

or control over the decisions of his former associate who prosecuted it, he cannot be found to have participated in any bad faith tactics or abuse of the appellate process.

Review should be granted, and respondent's order holding petitioner jointly liable for appellee Safeway Trail's fees and costs stemming from the Grimes v Safeway Trails appeal should be reversed. Otherwise, respondent's order, without a hearing in the District Court, denies petitioner due process of law and constitutes the taking of his property without due process of law in violation of the Fifth Amendment to the Constitution.

Respectfully Submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 85-5861 September Term, 1986
Civil Action No. 83-02560

Ronald B. Grimes,
Appellant

v.

Safeway Trails, Inc. Filed March 2, 1987

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: MIKVA, EDWARDS, and WILLLIAMS, Circuit Judges

J U D G M E N T

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, and for the reasons set forth in the attached Memorandum Opinion of the Court, it is

ORDERED and ADJUDGED, by the Court, that the order of the District Court on appeal herein is affirmed. And it is

FURTHER ORDERED by the Court that

reasonable costs and attorney's fees stemming from this appeal are awarded to appellee Safeway Trails, Inc. The amount of such costs and fees, and the assessment of liability for the payment of same, shall be determined by separate order of the Court. Resolution of these matters shall not delay issuance of the mandate. And it is

FURTHER ORDERED by the Court sua sponte that the clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Per Curiam
For the Court

George A. Fisher
Clerk

Date: March 2, 1987

Grimes v Safeway Trails, Inc., No. 85-5861

MEMORANDUM OPINION

MIKVA, Circuit Judge: In this case, we review a district court's denial of a motion to reopen and amend a voluntarily dismissed complaint. Appellant Ronald B. Grimes contends that the district court abused its discretion in denying the motion to reopen and amend. We reject Grimes' claim. We also award to appellee Safeway Trails, Inc. reasonable costs and attorney's fees stemming from this appeal.

In August of 1981, Grimes, an employee of Safeway Trails, Inc., filed a charge with the Equal Employment Opportunity Commission ("EEOC" or "Commission") alleging discrimination in the terms and conditions of his employment (the "discrimination claim"). In May of 1982, before the EEOC had taken any action on the discrimination claim, Grimes filed

another charge with the Commission. In this charge (the "retaliation claim"), Grimes averred that Safeway had discharged him because he had filed a discrimination claim with the EEOC.

On July 15, 1983, the EEOC issued a right-to-sue letter on the retaliation claim; the letter stated that the EEOC had found no probable cause to believe that retaliation had occurred and informed Grimes that he had ninety days within which to bring suit on the claim in district court. On August 31, 1983, Grimes initiated suit in district court on the retaliation claim. The suit, however, progressed slowly: Grimes twice moved the district court to stay the action, and the court granted each of these two motions. When the second stay elapsed, Grimes requested the district court to dismiss his action without prejudice. Safeway

objected to this motion, but on May 14, 1984, the district court dismissed the complaint without prejudice.

In November of 1984, the EEOC issued a right-to-sue letter on Grimes' discrimination claim. The letter stated that the Commission had found no probable cause to believe that discrimination had occurred and informed Grimes that he had ninety days within which to bring suit in district court on the claim. Grimes allowed the ninety-day period to elapse without bringing suit.

In February of 1985, Grimes filed a motion to reopen and amend the complaint that the district court previously had dismissed. Essentially, Grimes wished to reopen the retaliation suit and to amend the complaint in that suit so as to include the discrimination charges. On May 2, 1985, the district court denied the motion.

The district court subsequently denied a motion to reconsider, and Grimes appealed to this court.

We first note the appropriate standard of review to apply to the district court's decision. Grimes brought the motion to reopen under Federal Rule of Civil Procedure 60(b), which lists the circumstances in which a court may grant relief from a final judgment or order (in this case, the order dismissing the suit). This court has held that a motion under Rule 60(b) is committed to the sound discretion of the district court. See GAF Corp. v TransAmerica Insurance Co., 665 F2d 364, 370 (D.C. Cir. 1981). We therefore may reverse the district court's decision only if it constituted an abuse of discretion.

Grimes asserts that the district court should have granted the motion to reopen

in order to enable him to bring both of his claims against Safeway in one suit. This argument appears to run as follows. On November 19, 1984, the EEOC issued a right-to-sue letter on Grimes' discrimination claim. Grimes could have brought a suit in district court on the discrimination claim upon receipt of this letter. But Grimes could not have included his retaliation claim in the new suit. Title VII of the Civil Rights Act of 1964, under which Grimes brought his claims, provides that plaintiffs must bring suit within ninety days of the receipt of a right-to-sue letter. See 42 USC Sec 2000e-5(f)(1) (1981). This ninety-day limit operates as a statute of limitations. See Gordon v National Youth Work Alliance, 675 F2d 356, 360 (D.C. Cir. 1982). The EEOC had issued its right-to-sue latter on the retaliation claim in 1983 -- more than a

year before Grimes' receipt of a right-to-sue letter on the discrimination claim. A few courts have held that when a court dismisses a Title VII claim without prejudice, the plaintiff gets another ninety days in which to sue. See e.g., Johnson v Railway Express Agency, 489 F2d 525, 528-29 (6th Cir. 1972), aff'd. 421 U.S. 454 (1975). But the dismissal of Grimes' retaliation claim had occurred on May 14, 1984; more than ninety days had elapsed between that date and the EEOC's issuance of a right-to-sue latter on Grimes' discrimination claim. Grimes therefore could not pursue the retaliation claim in a suit brought after issuance of the right-to-sue latter on the discrimination claim; he could pursue both claims at that point only if the district court reopened the old suit and amended it to include Grimes' discrimination claim.

Grimes contends that the district court abused its discretion in precluding Grimes from combining his claims in this way.

This argument has no merit. We first note that Grimes could have brought both of his claims in one action through other means. Grimes could have demanded that the EEOC issue a right-to-sue letter on the discrimination claim at any point after 180 days had elapsed from his submission of the claim to the Commission. See 42 USC Sec 2000e-5(f)(1). Had Grimes made this demand prior to the time the statute of limitations expired on his retaliation claim, he could have brought both of his claims in one suit. Given the availability of this option, we cannot possibly accept the contention that Grimes' desire to adjudicate both of his claims in a single suit somehow entitled him to relief under Rule 60(b). Moreover, we would reject

Grimes' argument even if this option did not exist. Grimes essentially requested the district court to act so as to render ineffective Title VII's statute of limitations. The only reason he gave the court for making this request was that he preferred to litigate a single suit than two separate cases. A district court's refusal to moot a statute of limitations on so slight a ground does not constitute an abuse of discretion. Only if the district court had acceded to Grimes' request would this court have faced a serious question. Cf. Humphreys v United States, 272 F2d 411, 412 (9th Cir. 1959) (stating that a court cannot reopen a voluntarily dismissed case if the statute of limitations has run).

Safeway Trails seeks reasonable costs and attorney's fees stemming from this appeal, and we grant this request. The Supreme Court has held that a court may

grant costs and attorney's fees to a prevailing defendant in a Title VII case if the court finds that the plaintiff's "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Christianburg Garment Co. v EEOC, 434 U.S. 412, 422 (1978). We view Grimes' appeal as clearly frivolous, unreasonable, and groundless. Grimes challenged as an abuse of discretion a decision of the district court that is obviously entitled to respect. We therefore grant Safeway Trails' request for reasonable costs and attorney's fees stemming from this appeal.

It is so ordered.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 85-5861 September Term, 1986
Civil Action No. 83-02560

Ronald B. Grimes,

v.

Safeway Trails, Inc. Filed April 8, 1987

Before: MIKVA, EDWARDS, and WILLLIAMS, Circuit Judges

O R D E R

In Grimes v Safeway Trails, Inc., this court awarded to appellee Safeway Trails, Inc. reasonable costs and attorney's fees stemming from appellant Ronald B. Grimes' appeal. We now order appellant's former attorney, Harry Toussaint Alexander, to show cause why the Court should not sanction him by holding him personally liable for appellee's costs and fees. Mr. Alexander was the attorney of record in this appeal until March 4, 1986, the date on which appellant's brief was filed. As we held in

Grimes, the claims in appellant's brief were frivolous and without foundation. In addition, appellant's brief ascribed to an opinion of this circuit language that appears neither in the cited decision nor in the cited decision nor in any other reported case. We allow Mr. Alexander ten days to show cause why these circumstances do not warrant issuance of an order directing him to pay appellee's costs and attorney's fees.

The Clerk is directed to transmit copiues of this order to Mr. Alexander by regular mail and by certified mail, return receipt requested,

Per Curiam

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Chief Deputy Clerk

Date: April 8, 1987

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 85-5861 September Term, 1986
Civil Action No. 83-02560

Ronald B. Grimes,

v.

Safeway Trails, Inc. Filed May 15, 1987

O R D E R

Upon consideration of the responses of Harry Toussaint Alexander and Mercer Gordon Anderson to this court's orders to show cause, it is

ORDERED that Mr. Alexander and Mr. Anderson shall be jointly and severally liable for appellee Safeway Trails, Inc.'s reasonable costs and attorney's fees stemming from appellant Ronald B. Grimes' appeal.

Appellee's petition for fees and expenses in the amount of $34,065.26 was received by the Court and served upon

counsel on May 4, 1987. The time within which Mr. Alexander and Mr. Anderson may respond thereto is established as May 29, 1987.

FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Deputy Clerk

Date: May 15, 1987

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 85-5861 September Term, 1986
Civil Action No. 83-02560

Ronald B. Grimes,

v.

Safeway Trails, Inc. Filed June 30, 1987

BEFORE: MIKVA, EDWARDS, and WILLLIAMS, Circuit Judges

O R D E R

On review of the parties' petitions regarding costs and attorney's fees in the above-captioned case, it is hereby

ORDERED by the Court that Mercer Gordon Anderson and Harry Toussaint Alexander will be jointly and severally liable to Safeway Trails, Inc. for costs and attorney's fees in the amount of $21, 229.01. This Court will not allow any further claim for costs and attorney's fees in this case.

The Clerk is directed to transmit a

certified copy of this order to the District Court.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER, CLERK

BY:
Robert A. Bonner
Deputy Clerk

Date: June 30, 1987